Broussard, and pointing at the scales where winning numbers had been posted, said "Ernie, give him the policy slips in the bottom of the scale" or "give them the slips" (Applt.'s App. 17, 26, 35 and Ex. 5).

Broussard then turned over some 150 policy slips containing thousands of plays which were hidden in the scales. Among these slips were the two bets placed by the agents earlier the same day which matched the carbon copies retained by the agents as evidence (5 and Exs. 1, 1-A, 2 and 2-A).

The contents of the safe were seized under the search warrant, and, pursuant to Judge Noonan's pre-trial order (Govt.'s Brief, pp. 2, 3), only those exhibits relevant to the crime charged were admitted in evidence at trial (3).

Appellant admitted at trial by stipulation that he had not registered or paid a tax (32).

POINT I

The evidence against appellant was overwhelming and clearly supports the jury's verdict.

A reading of the statement of facts in this brief, as supported by the record, affirmatively shows the degree of appellant's complicity in the crimes charged. The following are the highlights of the evidence.

(a) Appellant Owned the Store and Was Present on the Premises

There can be no question that appellant's store was being used in a policy operation. Federal agents per-

sonally made many bets with appellant's employees, and both co-defendants, Aaron and Broussard, admitted taking bets and pleaded guilty before trial. At the time the search was made appellant was on the premises and directed an employee to turn over policy slips to the Federal officers (Applt.'s App. 17, 26, 35 and Ex. 5).

(b) Tangible Evidence of Gambling Was Found in Appellant's Store

In searching appellant's store pursuant to a warrant, Federal officers found policy slips and cash in excess of $10,000 in appellant's safe (7-9 and Applt.'s App. 15). They further found policy slips in the scales of which appellant had personal knowledge (Applt.'s App. 17, 26, 35 and Ex. 5). Thousands of money wrappers and pads were found in a rear room of the store (5).

Appellant personally opened the safe and admitted owning the cash found therein (4). Winning numbers from the previous day were openly posted on the front of the scales (Applt.'s App. 9).

(c) Appellant Lied to the Federal Officers and Was Evasive at the Time of the Search

The jury might also consider appellant's attitude at the time his store was searched, in determining his state of mind and knowledge of guilt.

Although appellant was the owner of the store, he told the Federal officers that he was merely visiting (2, 8). When asked to open his safe, he stated that he did not know the combination, but thereafter changed his mind (2, 7, 9).

If appellant had been innocent of any knowledge of gambling on the premises, he would have no motive to lie to the Federal officers to the extent that he did.

(d) Appellant's Financial Condition Was Unusual For a Butcher

The evidence showed that appellant was involved in rather high finance for the proprietor of a small butcher shop.

The Government's direct case showed that appellant had more than $1,300 in cash on his person (2, 8 and Applt.'s App. 26), and that he had more than $10,000 in cash in a locked safe (8, 9 and Applt.'s App. 15).

On cross-examination by defense counsel it was further brought out that appellant drove a Cadillac Coupe de Ville (6), and that the Federal Government had assessed taxes of approximately three-quarters of a million dollars against him (Applt.'s App. 22).

This type of financial status is more in keeping with the position of one with a higher income than a retail butcher, and might also properly have been considered by the jury in deciding whether appellant was a large scale policy operator.

The evidence against the appellant at the time his store was searched was testified to by three Federal officers who executed the warrant, and was substantially consistent under severe cross-examination.

This evidence was clearly sufficient to support the jury's verdict in this case. See *Brad* v. *United States*,

41 F. 2d 449 (7th Cir. 1930) and *Winkelstein v. United States*, 60 F. 2d 959 (3rd Cir. 1932).

The sole issue now presented is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict". *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 234 (1940). The evidence should be viewed in the light most favorable to the Government. *United States v. Manton*, 107 F. 2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U. S. 664 (1940).

Clearly the mass of evidence set forth in the statement of facts above was more than sufficient to meet this test.

POINT II

The testimony concerning appellant's prior arrest came as a responsive answer to a question by defense counsel on cross-examination.

On cross-examination of one of the Federal officers who had participated in the search of the store and the arrest of appellant, defense counsel asked the following questions (Applt.'s App. 35-6):

> "Q. Did you then have a conversation with the defendant? A. Yes. I . . .
>
> Q. In the rear? A. In the rear of the store. I got a piece of paper . . .
>
> Q. *What did you say to him and what did he say to you?*" (emphasis added)

The witness then responded:

> "A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx ad-

dress. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before."

At this point defense counsel attempted to break in and stop the responsive answer, but the Court remarked:

"The Court: You asked him what the conversation was. I didn't know that he had finished."

Whereupon, after brief colloquy, the witness responded:

"When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago."

Defense counsel then moved for a mistrial which was denied, and now claims on appeal that the denial of his motion warrants reversal.

(a) Appellant Cannot Fish for Favorable Testimony on Cross-Examination and Then Claim Error If Some of the Testimony Is Unfavorable

Defense counsel asked a question and got a responsive answer. To say that the answer was an unfair surprise is to disregard the natural probabilities of the case. This witness had searched appellant's store and participated in his arrest. He had questioned appellant on the same day at his store.

It would seem inevitable that a Federal officer who had questioned a potential defendant would have asked him if he had ever been arrested before.

When defense counsel asked: "What did you say to him and what did he say to you?", the witness had no choice but to relate the entire conversation.

In *Felton* v. *United States*, 170 F. 2d 153 (C. A. D. C. 1948), *cert denied*, 335 U. S. 831 (1948), the appellant complained that testimony had been admitted on cross-examination which connected him with another crime. The Court of Appeals at p. 155 stated:

> "Suffice it to say that this testimony was elicited by appellant's own counsel on cross-examination. Counsel apparently asked a few too many questions. That is a fault most of us who have tried cases in court have occasionally committed, but for such wounds there is no balm to be applied by a Court of Appeals."

(b) In the Light of the Overwhelming Evidence Against Appellant, the Careful Instruction of the Trial Court and the Remoteness of the Prior Arrest, Appellant Was Not Prejudiced

After the testimony about appellant's fifteen-year-old arrest was elicited by defense counsel, the trial court heard argument on a motion for a mistrial, and, at the beginning of the next court session, instructed the jury as follows:

> "However, at the close of the last session there was a witness on the stand who was asked a question by counsel for the defense and in answering the question said something about the previous arrest of this defendant.
>
> That ought not to have been brought out. Counsel in asking the question did not expect that it would be brought out, did not try to bring it out, and it was only on my insistence, and I wrongly insisted on it, that he told the whole story that was brought out."

Now, the reason that the law does not permit testimony with respect to previous arrests is that an arrest means absolutely nothing, just as I told you at the beginning of the case, a man is presumed to be innocent until he is found guilty, and the arrest is nothing more than the information that I was talking to you about, so that it has no bearing on the question in the eyes of the law. And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out." (Applt.'s App. 49).

At the conclusion of the case, the Court further charged:

"Any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant." (11).

In the light of the mass of evidence against the appellant set forth in Point I of the Government's Brief, and the remoteness in time of an arrest that took place fifteen years before the instant crime, the trial Court's careful instruction to the jury clearly obviated any prejudice to appellant. *United States* v. *Tramaglino*, 197 F. 2d 928 (2d Cir. 1952), *cert. denied*, 344 U. S. 864 (1952).

POINT III

Appellant was properly charged and convicted of substantive crimes and conspiracy to commit those substantive crimes.

Title 18, United States Code, § 3290 imposes an occupational tax on persons engaged in the business of accepting wagers. § 3291 requires such persons to register with the Collector of Internal Revenue (Govt.'s Brief, p. 5).

Engaging in the business of accepting wagers without registering and paying the occupational tax is punishable under the penalty provisions of § 3294 (Govt.'s Brief, p. 6).

Wilful violations as were charged in this case, are punishable under § 2707 by direct reference from § 3294(c) (Govt.'s Brief, pp. 4, 6).

Although appellant was specifically charged and convicted under § 2707(b), he contends that there can be no conspiracy to commit offenses under § 2707(b) which defines a misdemeanor, but that the charge should have been under § 2707(c) which is a felony. Appellant then argues that since § 2707(c) is a felony section, the case was improperly brought on by informations.

(a) Title 18, United States Code, § 2707(c) Has No Application to This Case and Appellant Was Properly Tried and Convicted Under § 2707(b)

Contreras v. United States, 213 F. 2d 96 (5th Cir. 1954), cited at p. 19 of appellant's brief, specifically holds that

§ 2707(b) is the applicable statute in this type of wagering tax case.

In construing § 2707, Judge Rives stated at pp. 97-8:

> "Subsection (a) of Section 2707 relates to a penalty to be assessed and collected in the same manner as taxes, and intends a mere civil sanction. *Paddock* v. *Siemoneit*, 147 Tex. 571, 218 S. W. 2d 428; 7 A. L. R. 2d 1062. Subsection (a) is therefore not pertinent here. Subsection (c) refers to 'Any person required * * *' to collect, account for and pay over any tax * * *.' There was no charge that the defendant was required to 'collect' or 'account for' the tax. Subsection (c) covers also 'any person who willfully attempts in any manner to evade or defeat any tax * * *', but the defendant was not so charged. Subsection (b) refers to 'Any person required * * * to pay any tax,' and that subsection (b) is the only one that could apply to the offense charged against the defendant, viz: that he 'did willfully and unlawfully fail to register and pay the special tax * * *.'"

The charge in this case was that appellant did "unlawfully, wilfully and knowingly fail to pay the special tax", and did "unlawfully, wilfully and knowingly fail to register" (Applt.'s App. pp. 2-3).

A mere reading of §§ 2707(b) and 2707(c) shows that the former is the only one that could be applicable to this case.

(b) Appellant Was Properly Charged and Convicted of Conspiracy to Violate the Wagering Tax Laws

Appellant argues at page 20 of his brief that § 2707(b), which proscribes wilful failure to register and pay taxes, contemplates mere passivity on the part of the violator, and that since conspiracy implies affirmative action, there can be no conspiracy to violate § 2707(b).

In so arguing appellant quotes at length from the opinion in *Spies* v. *United States*, 317 U. S. 492 (1943). The *Spies* case, however, dealt with the different degrees of proof of wilfullness required under Title 26, United States Code, §§ 145(a) and 145(b). Nowhere does that case hold that there cannot in law be a conspiracy to commit either offense.

It has long been settled that in a conspiracy case the crime is the *agreement* to commit the offense. *Goldman* v. *United States*, 245 U. S. 474 (1918); *United States* v. *Rabinowich*, 238 U. S. 78 (1915).

That there can be a conspiracy to commit an offense of omission is made clear by certain selective service cases where defendants were indicted for conspiring to fail to report for induction.

In *United States* v. *Offutt*, 127 F. 2d 336 (C. A. D. C. 1942) defendants attacked an indictment charging two persons with conspiring to cause one defendant to fail to report for induction. Defendants argued that such a conspiracy was a "legal impossibility".

In upholding the validity of the indictment, the Court of Appeals at p. 339 stated:

> "We hold point (2) unsound. The argument is a clever combination of the fact that an overt act is required, of the fact that only two conspirators are named, and of the fact that the object of the conspiracy was an offense of omission. Suppose we take the present statute. A is the one required to register. A and B agree that A will not register. B locks A in X's time vault which is not expected to open until after the registration period. It would appear that A and B agreed or conspired to commit an offense against the United States, the offense being the failure of A to register. The act of locking A in X's time vault is certainly an overt act, and it certainly was intended to effectuate the conspirators' purpose of having A not register. The essentials of the statutory crime of conspiracy are all present."

In the case at bar all of the elements of conspiracy were charged and proven and appellant properly stands convicted.

POINT IV

The sentence was not illegal.

Appellant contends that the District Court cannot legally impose probation in excess of the term of the maximum sentence provided by law.

Appellant's contention is squarely negatived by the express provisions of the statute and the case law. The

statute, Title 18, United States Code, § 3561, provides as follows:

> "*Suspension of sentence and probation.*
>
> * * * * * *
>
> The period of probation, together with any extension thereof, shall not exceed five years."
>
> * * * * * *

This applies to misdemeanors as well as felonies. In *Hollandsworth* v. *United States*, 34 F. 2d 423 (4th Cir. 1929), the Court said at pp. 426-7:

> "But there is no express provision of the Probation Act that the term of probation must not exceed the maximum period for which a sentence of imprisonment may be imposed. Congress expressly provided, in section 1 of the act (18 USCA § 724) that the period of probation, together with any extension thereof, should not exceed five years. Herein is no suggestion that the period of probation is limited by the period of maximum sentence."
>
> * * * * * *
>
> "It is clear that these terms of the statute extend rather than restrict the powers of the District Court. They do not justify the conclusion that the maximum five-year period of probation allowed by section 1 of the act is to be read as if subject to the provision that the term of probation shall in no case exceed the term of maximum sentence. There is indeed no necessary connection between the term of probation and the term of imprisonment."

See also *Mitchem* v. *United States*, 193 F. 2d 55 (5th Cir. 1951).

CONCLUSION

For the foregoing reasons the Government respectfully requests that the conviction in this case be affirmed.

Dated: New York, N. Y.
May 31, 1956.

Respectfully submitted,

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

GEORGE S. LEISURE, JR.,
Assistant United States Attorney,
Of Counsel.

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Excerpts from Testimony

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 145-283

C. 147-278

UNITED STATES OF AMERICA

vs.

SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD.

Before—HON. EDWARD J. DIMOCK, *D. J.*,
and a Jury.

New York, November 9, 1955;
3. o'clock p.m.

APPEARANCES:

PAUL W. WILLIAMS, Esq., United States Attorney, for the Government. By George S. Leisure, Jr., Esq., Assistant United States Attorney.

BENJAMIN LEVY, Esq., Attorney for Defendants Samuel Aaron and Ernest Broussard.

ARNOLD D. ROSEMAN, Esq., Attorney for Defendant Salvatore Apuzzo.

(36)

JAMES J. GUTMUS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Leisure:

(38)

Q. What was his response to the questions in regard to what he was doing there? A. Mr. Apuzzo at the time of the initial questions stated he was just visiting there.

Q. You say he was searched on that occasion? A. He was.

Q. In your presence? A. He was.

Q. And was money found on his person? A. Yes, sir, money was found on his person in the amount of approximately $1300.

(39) And was that counted in your presence? A. That was counted in my presence.

Q. Now, was there a conversation between Mr. Lemler and Mr. Apuzzo after the search? A. There was.

Q. Will you tell us the nature of that? A. Well, after the search we proceeded, Mr. Lemler, Mr. Gianatasio and myself, to the front part of the store.

We asked Mr. Apuzzo to open the safe that was under the counter. He initially denied knowing the combination of the safe.

I heard Mr. Lemler ask—tell him that if the safe was not opened we would have to get a truck and bring it down to our own office where it would be opened forcibly.

At that point Mr. Apuzzo proceeded to the safe and opened it in our presence.

The safe was under the counter in the butcher shop proper.

Q. Now, were the contents of the safe searched in your presence? A. Yes, sir.

Q. And did you participate in that search? A. The contents of the safe were removed in (40) the presence of Mr. Lemler and Mr. Gianatasio and Mr. Apuzzo, and the other employees of the store.

Q. Was there cash in the safe?

Mr. Roseman: I am going to object to that, your Honor. I think it is now the propitious time for me to argue that motion.

The Court: Very good. The jury will be excused for a short time.

* * * *

(62) * * *

The Court: I have grave doubt as to the admissibility of the bankbook and the insurance policies as against the claim of illegal search and seizure.

Mr. Leisure: In that case, your Honor, I will respectfully withdraw the offer of the last exhibits and consent to strike Exhibits 7 and 8 which are now in evidence, the two bankbooks, and I think that would simplify it.

The Court: All right. I will accept that. Then Exhibits 7, 8 and 9 will be treated merely as exhibits for identification.

Mr. Leisure: I think that disposes of it, your Honor.

(Government's Exhibits 7, 8 and 9 for identification received in evidence, now only marked for identification.)

The Court: The Court will take a short recess.

(Short recess.)

(63) (The following proceedings took place in the presence of the jury:)

Mr. Leisure: May I proceed, your Honor?

The Court: If you please.

Direct examination continued by Mr. Leisure:

Q. Mr. Guthrie, you testified before the recess that you found between ten and eleven thousand dollars in the safe.

Did you have any conversation with Mr. Apuzzo with respect to that matter? A. At the time the money was being counted; that is, the money found in the——

Mr. Roseman: I can't hear the witness, your Honor.

The Court: Please speak a little louder.

The Witness: At the time the money was being counted in the presence of Mr. Apuzzo on one of the paper boxes at the rear of the front part of the store there was some conversation to the effect that, "Are you going to take the money?"

We indicated we would.

He said, "It belongs to me."

And, of course, we did take it anyway.

(65)

Q. I show you Government's Exhibit 5 for identification, and ask you if that is the brown envelope and the con-

tents that you have just testified about? A. That is right. There were two additional slips in this group, however, that were removed at the time.

Q. I show you Government's Exhibits 1 and 2 in evidence and ask you if those two slips were found among those slips that were in the scale? A. They were.

* * * * *

(69) Cross examination by Mr. Roseman:

* * * *

(81) * * *

Q. Was there a bathroom there, a lavatory? A. I don't recall a bathroom or lavatory. Do you want me to describe it, sir?

Q. Yes, if you will, please. A. To the best of my recollection as we entered the back room on the right hand side, there was what I would say was a makeshift table, upon which you had an adding machine, and also upon which there were several thousand money wrappers of denominations anywhere from $50 down to one cent.

There were several hundreds more pads of paper, several boxes of small envelopes which you would describe as pay envelopes.

* * * *

(90) * * *

Q. And Mr. Apuzzo told you he was the owner of this shop? A. He did not.

Q. When did you learn that he was for the first time? A. For the first time?

Q. In time. A. In time there was an admission of ownership.

Q. I said when did you first learn that Mr. Apuzzo owned this shop in time? A. When he made the admission thereto.

Q. And when was that? A. That was later that day at 143 Liberty Street.

Q. But not before that? A. Not before that, except, of course for the indicia of ownership that we found at the shop.

* * * *

(123)

Q. Will you tell the jury when you spoke with him again? A. I spoke to Mr. Apuzzo sometime later that summer in the process of seizing a Cadillac de Ville in the execution of a lien——

Q. Did you seize this car? A. I did not. A collection officer——

Q. Were you there? A. I was present.

Q. Did you turn his car over to another agent? A. I did not.

Q. On what day was that, if you please? A. I don't recall the date. It was sometime later that summer.

Q. Was it in the summer of 1953 or the summer of 1954? A. I am quite certain it was the summer of 1953.

* * * *

(138) * * *

MARTIN D. LEMLER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Leisure:

* * * * *

(141) * * *

Q. What did you do when you got out into the outer room? A. Mr. Apuzzo and the other investigators and myself then went to the front of the store, where I noted a safe, a small safe, underneath the counter, one of the meat counters.

I tried the door of the safe. It was locked. I asked Mr. Apuzzo to open it and he said he didn't think he could; he didn't know how to open it.

Mr. Rosenman: I can't hear that.

(142) (Answer read.)

The Court: Will you speak up a little louder.

A. I then advised Mr. Apuzzo that the warrant had directed us to remove the contents of any safe found on the premises and that in the event the safe wasn't opened, we would be forced to take it to a Government warehouse.

Q. What happened then? A. Mr. Apuzzo opened the safe.

Q. Did you search the contents of the safe? A. Yes, I did.

Q. I show you Government's Exhibits 3, 4 and 6 in evidence and ask you if those three documents were found in the safe on that occasion? A. Yes.

Martin D. Lender—for Government—Direct

Q. Was there some money found in the safe, too? A. Pardon?

Q. Was there some money found in the safe? A. Over $10,000, I believe.

Q. In cash? A. In cash.

* * * *

(188) * * *

VINCENT J. GIANATASIO, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Leisure:

* * * *

(190) * * *

Q. Were you present when Mr. Apuzzo was searched? A. Yes, I was.

Q. Was any money found on his person? A. There was $1366.

Q. It was counted in your presence? A. Yes, and Mr. Apuzzo's presence.

Q. Were you present when any conversation was had with the defendant Apuzzo in the back room? A. Yes.

(191) Q. What was the nature of that conversation? A. Well, we asked Mr. Apuzzo his name and his address and asked him what he was doing there. He told us that his name was Apuzzo and he gave me a Bronx address and he said he was visiting in the rear.

Q. Did you have a further conversation with respect to his safe? A. Yes. We took Mr. Apuzzo from the rear room to the butcher shop part of the store, and Special

Investigator Lemler said, "Who's got the combination to the safe?"

Broussard, who was behind the counter, said, "I don't have the combination."

Mr. Apuzzo said, "I don't have the combination."

And there was another man behind the counter by the name of Henry something—I don't just recall offhand. He said he didn't have the combination. So I heard Special Investigator Lemler say to Mr. Apuzzo, "All right, I'll have to call up a truck and take the safe to the office and open it there."

Mr. Apuzzo then went behind the counter and opened the safe.

Q. Were you present when the contents of the (192) safe were searched? A. Yes, I was.

Q. I show you Government's Exhibits 3, 4 and 6 in evidence and ask you whether these were found in the safe (handing to witness)? A. Yes, this is one slip found in the safe. There are my initials on it. This envelope was also found in the safe. My initials are on it.

Q. Referring to Exhibit 4 in evidence: A. And this other envelope, Exhibit No. 3, this was found in the safe, and I initialed that and dated it.

(366) CHARGE OF THE COURT

The Court: (Dimock J.) Ladies and gentlemen of the jury, it is my duty as judge to instruct you as to the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you.

On the other hand, it is your exclusive province to

determine the facts in this case and to consider the evidence for that purpose. You are the sole judges of the weight, the effect, and value of the evidence and the credibility of the witnesses. Just as you are not permitted to encroach upon the Court's functions in giving instructions on the law, so I must be careful not to encroach on your function as the sole judges of the facts.

The defendant, Salvatore Apuzzo, is on trial under two informations which have been tried together at one time. One of these informations that I will deal with first is one which charges a conspiracy to violate the United States Code, specifically Title 26, Sections 2707(b), 3277, 3290, 3291(a), 3292, and 3294.

That, you will note, is an information (367) charging conspiracy.

The information that I will deal with secondly charges the same defendant with the crime of violating the same sections of the United States Code. That is framed in two counts.

Count 1 charges the violation of the same sections that I enumerated to you before, and they deal with failure to pay the special tax involved.

The second count of this substantive information charges violation of the same sections again except that 3291(a) is substituted for 3292, and that deals with the failure to register.

Now, in the second information composed of these two counts there is no charge of conspiracy. The second information is, as I have called it, a substantive charge. It is for the direct violation of a criminal statute of the United States. So in discussing the two informations I will refer to one as containing the conspiracy charge and the other as containing the substantive charge so that we can

keep those two informations separate in discussing and considering them.

The verdict that you reach in this case must be based solely on the evidence and in accordance with (368) these instructions.

The informations that I have just referred to are nothing but written accusations. They are charges and not in themselves any evidence of the guilt of the defendant.

The fact that the defendant is the subject of an information and on trial should not be taken against him. He is presumed to be innocent, and this presumption has the weight and the effect of evidence on behalf of the defendant. It continues in his favor throughout the entire trial and even during your deliberations in the juryroom, and is overcome only if and when guilt is established beyond a reasonable doubt.

Any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant.

The defendant does not have to prove his innocence. The burden of proof is upon the government to establish the guilt of the defendant beyond a reasonable doubt. That burden never shifts and is not met unless and until the proof offered by the Government, and all the evidence in the case convinces you beyond a reasonable doubt of the defendant's (369) guilt.

Having stated that the burden rests upon the Government to prove the guilt of the defendant beyond a reasonable doubt, the next question that naturally arises is, What is a reasonable doubt?

Courts, judges, and students of the law have defined it in various ways, and actually all of them add up to the same thing: that the words almost define themselves;

that it is a doubt founded on reason and arising from the evidence. Reasonable doubt means a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt which is substantial and not merely a shadow. It does not mean a doubt which is either capricious or speculative. Neither does it mean a doubt born of a reluctance on the part of a juror to perform an unpleasant duty or a doubt arising out of sympathy for the defendant, or out of anything other than a candid consideration of all the evidence.

If after a fair and impartial consideration of all the evidence, you candidly and honestly say that you are not satisfied with the guilt of the defendant, or that you do not have an abiding conviction of his guilt which amounts, to a moral certainty of such (370) guilt, then you have a reasonable doubt and you should find the defendant not guilty. But, however, if after such an impartial consideration of all the evidence, you candidly and honestly say that you have an abiding conviction of the guilt of the defendant which amounts to a moral certainty, such a conviction which you would be willing to act on in the more weighty and important matters of your own affairs in life, then you have no reasonable doubt and you should find the defendant guilty of the charge made against him.

With the foregoing general instructions as to the law, let us turn to the issues and the facts in this case.

The first information, the conspiracy information, reads this way:

"The United States Attorney charges:

"1. From on or about the 28th day of July, 1953, up to and including the 5th day of August, 1953, in the Southern District of New York, the defendants, Samuel Aaron, Salvatore Apuzzo and Ernest Broussard, and others to the United States

Attorney unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to (371) violate the United States Code;"

citing that long string of numbers that I gave you before.

"2. It was a part of the conspiracy that the said defendants unlawfully, wilfully and knowingly would engage in the business of accepting wagers in the County of New York, New York, individually and as a co-partnership, and fail to pay the special tax imposed by law to the Director of Internal Revenue for the Upper Manhattan District, at New York, New York.

"3. It was a further part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would engage in the business of accepting wagers, in the County of New York, New York, individually and as a co-partnership, and would fail to register with the Director of Internal Revenue for the Upper Manhattan District of New York, at New York, New York, as required by law, in violation of Title 26, United States Code,"

citing those sections of the United States Code which are alleged to have been violated.

(372) Then the information goes on with three paragraphs headed "Overt Acts" and the wording of these paragraphs is:

"1. In pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1953, in the Southern District of New

York, the defendant Samuel Aaron accepted a wager from Edward E. Goodwin.

"2. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1953, in the Southern District of New York, the defendant Ernest Broussard accepted a wager from Columbus Fletcher.

"3. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 5th day of August, 1953, in the Southern District of New York, the defendant Samuel Aaron accepted a wager from Columbus Fletcher,"

citing Title 18, United States Code, Section 371.

Now, you have noticed that that information charges a conspiracy to violate the laws of the United States in two respects:

(1) With respect to engaging in the business (373) of accepting wagers without paying the special tax imposed by law; and

(2) With respect to engaging in the business of accepting wagers without registering with the Director of Internal Revenue as required by law.

It is because of these two particular charges, involving engaging in the business of accepting wagers without paying the tax and without registering that the case comes before a Federal Court rather than one of the State Courts.

Now, you have noticed that the indictment charges a conspiracy to violate the laws of the United States in two respects. In addition to the charge of conspiracy to vio-

late the laws of the United States in these two respects you will notice that there are three overt acts charged. That is a particular requirement in the case of a conspiracy information, and that I will refer to further when I am instructing you with respect to the crime of conspiracy.

In order that you may have before you the laws which I refer to—and I don't think they are much longer than the numbers that I read, but I will read to you the pertinent parts.

First we will take the United States Code (374) with respect to the imposition of the tax; section 3290 of Title 26 of the United States Code, which contains this general requirement:

> "A special tax of $50 per year shall be paid by each person who is . . . engaged in receiving wagers . . ."

Now here I charge you that this tax is imposed upon any person who receives wagers, whether or not this is the only activity in which he engages. In fact, the person does not have to be primarily engaged in this activity.

Then Section 3285 defines wagers to include

> "any wager placed in a lottery conducted for profit."

And the term "lottery" is defined in the same section to include

> "the numbers game, policy, and similar types of wagering."

Section 3291 deals with the requirement of registration, and the pertinent parts read as follows:

> "Each person required to pay a special tax under

this sub-chapter shall register with the Collector of the district:

"(1) His name and place of residence;

(375) "(2) If he is liable for tax . . ., each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf . . ."

And Section 2707 deals with the effect of failing to comply with the statutes I have just quoted and that section reads:

"Any person required under this sub-chapter to pay any tax, or required by law or regulations made under authority thereof to . . . supply any information, for the purposes of the computation, assessment or collection of any tax imposed by this sub-chapter who wilfully fails to pay such tax, . . . or supply such information at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor."

That covers the two offenses which the defendant is charged with conspiring to commit in the conspiracy information.

The second information, the substantive one, refers to the actual failure of this defendant, while engaging in the business of accepting wagers, to pay the special tax and to register. That information (376) reads, beginning the same way as the other:

"The United States Attorney charges:

"On or about the 5th day of August, 1953, the de-

fendants Samuel Aaron, Salvatore Apuzzo and Ernest Broussard who engaged in the business of accepting wagers in the County of New York, New York, individually and as a copartnership during the month of August, 1953, did unlawfully, wilfully and knowingly fail to pay the special tax imposed by law to the Director of Internal Revenue for the Upper Manhattan District of New York, New York,"

citing these sections of the law.

"Second Count

"The United States Attorney further charges:

"On or about the 5th day of August, 1953, in the Southern District of New York, the defendants Samuel Aaron, Salvatore Apuzzo and Ernest Broussard who engaged in the business of accepting wagers in the County of New York, individually and as a copartnership during the month of August, 1953, and who were required to pay the special tax imposed by law, did unlawfully, wilfully and knowingly fail to register with the (377) Director of Internal Revenue for the Upper Manhattan District of New York at New York, New York, as required by law,"

and so on.

I have already read to you the pertinent parts of these sections of the United States Code, which involve the payment of the special tax and registration by one who is engaged in the business of accepting wagers. In other words, the Government is charging in the conspiracy in-

formation that the defendants conspired with others to violate several laws of the United States. The conspiracy count does not charge, and the Government is not required to prove as to that conspiracy count itself, that the defendant actually violated any of the laws I read to you.

Putting it another way, the defendant is not charged in the conspiracy information with failing to pay the special tax and failing to register while engaged in the business of accepting wagers. He is charged with conspiracy to do those things.

The information is based on the conspiracy provisions of the statute, Section 371 of Title 18 of the United States Code, which makes it an offense if two or more persons conspire to commit any offense against (378) the United States, and one or more of such persons do any act to effect the object of the conspiracy.

That is the overt act that I told you about.

The Government, to substantiate the conspiracy information, is required to prove the conspiracy charge, the essential elements of which are (1) the existence of the conspiracy and (2) the commission of at least one of the overt acts charged in the information. And before you may convict, you must find each essential element beyond a reasonable doubt. If you do not, then your verdict must be not guilty on the conspiracy information.

A conspiracy is a combination or an agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. It is a partnership in criminal purposes. The gist of the offense is the unlawful combination or agreement to violate the law. However, it is not necessary that two or

more persons should meet together and enter into a formal or explicit agreement either in writing or by oral words, stating the formation of the conspiracy, or the details of the plan, or the means by which the unlawful scheme is to be carried (379) out. Indeed, it would be unusual if there was such a formal agreement. When men in fact enter into a plan of that character, much is left to unexpressed understanding. It is sufficient if you find beyond a reasonable doubt that the minds of the parties met in an understanding way so as to bring about a deliberate agreement to do the act or acts charged.

The agreement generally is a matter of inference deduced from the acts of the persons accused done in pursuance of the apparent criminal purpose. The crime is completed when an overt act to effect the object of the conspiracy is done by at least one of the conspirators. The overt act need be neither criminal nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement and must be done in furtherance of the object of the agreement.

Thus, in this case there are three overt acts charged. The overt act essential to a conspiracy prosecution need not implicate all of the parties to the conspiracy. If you find that any one of the overt acts alleged did in fact occur and (380) that the act was committed in furtherance of the purpose of the conspiracy, then the second element of the conspiracy count has been proved.

Incidentally, I must charge you that you must find, if you are to convict the defendant, that one of these overt acts was performed in the Southern District of New York, so as to give this Court and this jury jurisdiction.

If you fail to find beyond a reasonable doubt that there

was a conspiracy, or that this defendant was a member of it, or if you fail to find beyond a reasonable doubt the commission of one or more of the overt acts, or that it or they were in furtherance of the conspiracy, then you should acquit on the conspiracy information.

Of course, if in the first instance you find there was no conspiracy, then you do not consider at all the issue of overt acts.

Now, as to the substantive count, that is much simpler. But there you do have that same element of the possible responsibility of a man who does not actually with his own hands do the acts which are charged as a crime.

In so far as the substantive offense is (381) concerned, in order to convict the defendant of failure to pay the special tax and register while engaged in the business of accepting wagers, it is necessary that you be satisfied beyond a reasonable doubt that the defendant was actually engaged in the business of accepting wagers on or about the date alleged in the information, and that the defendant failed to pay the special tax and register.

However, what I have said does not mean that in order to convict the defendant you must find that he personally accepted the wagers, or that he was present when the wagers were accepted. It is enough if others took bets at his direction, or on his behalf, or with his consent. That is based on that statute which we have in Section 2 of Title 18 of the United States Code headed "Principals", which says:

> "Whoever commits an offense against the United States or aids, abets, counsels, induces or procures its commission is a principal; and
>
> "Whoever causes an act to be done which, if directly performed by him, would be an offense

against the United States is also a principal and punishable as such."

Thus, every person concerned in the commission (382) of a crime who either directly or actively commits the act constituting the offense or knowingly and wilfully aids and abets in its commission, or, whether present or not, advises and encourages its commission, is regarded by the law as a principal in the crime thus committed and is equally guilty thereof.

To abet another in the commission of a crime implies consciousness of guilt in instigating, encouraging, promoting or aiding in the commission of such criminal offense. In short, in order to aid and abet another to commit a crime, it is necessary that the defendant in some way associate himself with the venture, that he participate in it as something he wishes to bring about, and that he seek by his action to make it succeed. It is not enough that he simply know that a crime has been committed, or that he did nothing to prevent it.

I must charge you that before you may find the defendant guilty of the substantive crime you must find that the crime as charged was committed in the Southern District of New York.

One further point on the information. You will note that both informations charge the defendant (383) with wilfully and knowingly violating the United States statutes. Therefore, it is not sufficient to convict this defendant of this charge for you to find only that the defendant did not register and did not pay the special tax. Furthermore, it is not sufficient to convict the defendant of this charge if you find also that the defendant was engaged in the business of accepting wagers and, there-

fore, should have registered and should have paid the tax.

You must find, in order to convict the defendant of the wilful violation charge, that he failed to register and failed to pay the tax while engaged in the business of accepting wagers and that he did so wilfully and knowingly.

If the defendant failed to register and failed to pay the tax because of ignorance of his liability for the tax, he did not do so wilfully.

In determining the question whether the defendant was ignorant of the requirement of registration and payment of the tax you may consider the testimony as to his attitude at the time of the raid. Attempts to hide, suppress, or secrete evidence may be considered as evidence of guilty knowledge of consciousness of guilt.

(384) If you find that the defendant did not wilfully fail to pay the tax, you may still find him guilty in the substantive information only of the lesser offense of merely failure to pay the special tax while engaged in the business of accepting wagers. The question of the defendant's ignorance of the requirement of registration and payment of the tax should not enter into your decision of this lesser offense.

To find the defendant guilty of this lesser offense, you need find only that the defendant failed to pay the special tax and was engaged in the business of accepting wagers. There is no such lesser offense in the statutes for failure to register. And defendant cannot be found guilty of this lesser offense in the conspiracy information because by definition a conspiracy requires an agreement to violate the law, as I have already instructed you.

Therefore, only in the substantive information, and

there only in the first count, may you find the defendant guilty of this lesser offense, if you acquit him of the wilful offense charged in the information.

That is all pretty complicated; so I am going to let you take into the juryroom a blank form (385) for your verdict with four places for you to record a verdict of not guilty or guilty.

The first deals with the conspiracy information. The second deals with count 1 of the substantive information, wilful failure to pay the tax. The third deals with count 2 of the substantive information, wilful failure to register. And the fourth is to be considered only if you have not found the defendant guilty under any of the other three heads; it deals with the non-wilful failure to pay the special tax.

Now let us consider the evidence in the case. First I must point out that both the defendant and the Government have stipulated that the defendant has not paid the special tax and has not registered. This is to be considered as evidence of just those facts. This stipulation does not mean by itself that the defendant was required to pay the tax and register. Neither does it mean that the defendant wilfully failed to pay the tax and register. Those issues are for you to determine.

Now, the evidence which has been adduced before you involves statements by witnesses that wagering was carried on at the premises where this defendant was (386) running a butcher business, and the evidence as brought out in the testimony is that at a later time Treasury officials made a raid on these premises and made certain requests, made certain statements, made certain observations, all while this defendant was present on those premises.

Now, the defendant does not deny that the wagering took place on his place of business, but the defendant categorically denies that he knew that Aaron and Broussard were accepting wagers in his store and categorically denies that he aided them, conspired with them, or received any of the profit from the wagers, or what he is alleged to have said as the Treasury Agents testified when they accosted him and when they made the raid on his premises.

The testimony of the defendant's witnesses was not as long as the testimony of the Government witnesses but, of course, you are not to weigh the testimony in the case according to the amount of words to produce the case for the Government and the case for the defendant.

Now, you noticed, or you will notice, that the main prop of the Government's case rests on the (387) testimony of witnesses who have acknowledged participation in the events. I would say if you disbelieve their stories with respect to the defendant now on trial and do not find them credible, your verdict should be for the defendant, for essentially the entire case rests on such testimony.

There are two classes of evidence recognized and admitted in courts of justice upon either of which juries may lawfully find an accused guilty of crime. One is directed to positive testimony by an eye witness or participant to the commission of a crime; and the other is proof in evidence of a chain of circumstances pointing toward the commission of the crime by the defendant, and known as circumstantial evidence.

It is not necessary that the participation of the defendant should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally direct proof of

a criminal conspiracy is not available, and it will be disclosed only by the setting side by side of the circumstances.

To give you an example of what I mean by circumstantial evidence you can think of the case where (388) it is difficult to tell by looking out the window whether it is raining outside or not. You look out to see whether people have umbrellas up or not and if people do have their umbrellas up you are justified in assuming that it is raining although you have not actually seen the rain. That is circumstantial evidence that it is raining rather than direct evidence that it is raining.

In order to justify a jury in finding a verdict of guilt based on circumstantial evidence, the facts and circumstances must not only be consistent with each other and with the guilt of the defendant, but they must be inconsistent beyond a reasonable doubt with any reasonable theory of the defendant's innocence.

If you find that every circumstance relied upon as incriminating is susceptible of two constructions or interpretations, each of which appears to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt. No conviction can be based upon suspicion or conjecture, however strong. A conviction can be based only upon actual (389) proof of guilt beyond a reasonable doubt. Otherwise the jury should acquit.

With the general principles to which I have already referred on the law of conspiracy as a guide and my discussion of the substantive counts, you will consider all of the evidence and approach the important question of whether the prosecution has proved beyond a reason-

able doubt the existence of the conspiracy alleged in the information first, and if such conspiracy did exist whether the defendant was a party to it, and whether the defendant entered into it with the knowledge of its nature and purpose.

And with respect to the substantive information you will consider all of the evidence and approach the question whether the prosecution has proved beyond a reasonable doubt that the defendant was guilty of the violation of the statutes involving failure to pay the special tax and failure to register while engaged in the business of accepting wagers. Those are the only charges in the substantive information.

In dealing with the conspiracy count, as I have suggested to you, I think you had better go in steps. You must first determine from all the (390) evidence in the case whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine whether or not the defendant was a member of the conspiracy.

In considering whether or not the defendant was a member of a conspiracy, you must do so without regard to and independently of the statements and declarations of the other members of the conspiracy. You must determine the participation of the defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements and his own connections with the actions and the conduct of others in the conspiracy. However, once you have determined that defendant was a member of the conspiracy, using this test, you may then consider as if made by him the statements and declarations of other co-conspirators made in furtherance of the conspiracy and during the existence thereof as alleged.

Now, if after considering all the evidence in the case you believe the versions of the Government's witnesses beyond a reasonable doubt, you have sufficient evidence on which to base the verdict of guilty in the conspiracy information. If you disbelieve such (391) testimony, you should acquit on the conspiracy information.

In making reference to the testimony of witnesses, posing rhetorical questions, I have not attempted to touch all the facts, and my failure to comment upon any of the other parts of the evidence is no indication that it has been disregarded, or that I am placing undue influence and emphasis upon such testimony as I have recalled it to you. It was merely to focus attention towards some of the issues and facts to be considered by you in reaching a conclusion, and it is your recollection of the evidence and yours alone that governs. If your recollection of the testimony differs from mine, you will have no hesitancy, and I emphasize that as strongly as I can, in rejecting any statement I make.

I have attempted to avoid any comment which might suggest my personal views on the weight of the evidence, the credibility of the witnesses, the inferences to be drawn, or the importance of one phase or segment of the testimony as compared with another; and no comment made by me has been so intended.

The actions of the Court during the trial in ruling on motions or in overruling objections made (392) by the defendant, or sustaining objections made by the Government, are not to be taken by you as any indication of the guilt or innocence of the defendant. These are matters of procedure and law with which you have no concern. You are expressly to understand that the Court has no opinion as to the guilt or innocence of the defendant.

If I or either counsel have referred to testimony, and if either my reference or that of counsel differs from your recollection of the testimony, follow your recollection. As I have told you several times, you are the sole judges of the facts. The arguments of counsel addressed to the Court on the questions of law upon motions for admission or exclusion of evidence are to be disregarded by you; and if any answer of a witness is excluded or stricken from the record, you are to entirely disregard the question and the answer, for you may only consider matters admitted in evidence.

The duty of weighing and determining the credibility of the witnesses is exclusively yours. In your search for the truth, you should be guided by using your plain everyday common sense. You have seen the witnesses on the stand and observed their (393) manner of giving testimony. How did their story impress you? What degree of credit you should give the witness should be determined by his or her character, conduct, manner of testifying, and relation to the controversy in particular.

Are the witnesses interested in the outcome of the case? Is there a motive to testify falsely? Were those witnesses on behalf of the Government who were concerned in the matter professionally interested in securing a conviction? Where a witness has a personal interest, a direct interest, in the result of a case the temptation may be strong to color, pervert, or withhold facts. On the other hand, such a witness may be telling the truth, despite any alleged interest in the outcome. You must consider all the attendant circumstances in deciding whether and to what extent interest has affected the witness.

I have just instructed you with respect to the various factors which you might take into account in considering what weight should be given to the testimony of the witnesses who may have a motive in testifying falsely.

If you find that a witness wilfully testified falsely to a material fact, you are privileged to reject (394) all of his testimony or, if you elect to do so, you may believe part of it and accept that part of it which appeals to your reason or which was corroborated by other credible evidence and reject the rest.

The defendant did not testify in this case. That is his absolute right, and in no respect may his failure to testify be considered by you as any evidence against him, or as a basis for any presumption or inference unfavorable to him. You must not permit such fact to weigh in the slightest degree against him, nor should it enter into your discussions nor your deliberations.

The prosecution must prove the defendant's guilt by the required degree of proof, as already explained in these instructions.

The question of possible punishment of the defendant is no concern of the jury and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively on the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence.

On your oath as jurors, you cannot allow (395) consideration of the punishment which may be inflicted upon the defendant if he is convicted to influence your verdict in any way.

The jurors are entitled to their own opinion, but they should, however, exchange views with their fellow jurors.

That is the very purpose of jury deliberation, to discuss and to consider the evidence, to listen to the arguments of the fellow jurors, to present your individual views, to consult with one another and to reach an agreement based solely and wholly on the evidence.

You should do so without violence to your own individual judgment. You must decide the case yourself, and you should do so only after consideration with your fellow jurors of the evidence in the case, and you should not hesitate to change your opinion if it appears to be erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered and outweighed. You decide the case from the evidence and the evidence alone, and you must not be influenced by any assumption, conjecture, or any inferences not (396) warranted by facts proved to your satisfaction.

If in the course of your deliberations you require any of the exhibits, you may send out a note and they will be delivered to you. Likewise, with respect to copies of the information, if you should want them; and if you desire any testimony to be read, that may be done, or if you find that anything that the Court has said which becomes important in your deliberations requires further explanation, you may send a note to the Court stating your difficulty and an attempt will be made to clarify what is troubling you.

Your oath sums up your duty; and that is, without fear or favor to any man you will well and truly try the issues between this defendant and the United States of America according to the evidence given to you in court and the laws of the United States.

You may now take the case and consider it in view of its importance and the gravity of the charge made in the informations. It is important to the public and it is also important to the defendant.

Will counsel approach the bench, please.

* * * *

(400) * * *

(At this point the conference among Court and counsel at the bench out of the hearing of the jury terminated and the proceedings were resumed in the hearing of the jury as follows:)

The Court: Ladies and gentlemen, counsel have called to my attention the fact that at one time during the charge I used the word "indictment" instead of "information." As you perhaps noticed I was using a form of a charge as a basis for what I was saying to you, which charge had been used in other cases where the general instructions would be the same, and in that way I picked out the word "indictment" which I had used in a case which had been brought on by indictment.

Now, this case has been brought on by (401) information, and the difference is that the information can be used in misdemeanor cases and it is originated and presented to the Court simply on information given by the United States Attorney, whereas an indictment is found by a grand jury. But neither of them has the slightest effect in indicating the guilt of the defendant, so that you are not to consider the information in this case as any evidence that the defendant is guilty, just as I would charge in a case which has been brought on by indictment that the jury was not to consider the fact of the indictment as any evidence of guilt.

Also counsel have requested that I read to you the full stipulation that was entered into by the defendant with the Government with respect to the lack of necessity of certain proof in the case, and which reads:

> "It is hereby stipulated and agreed by and between the United States of America and the defendant Salvatore Apuzzo as follows:
>
> "That since it is the defendant's contention that he was not engaged in the business of accepting wagers in the year of 1953, the defendant stipulates that he did not pay the special occupational tax (402) imposed by Section 3290, Title 26 of the United States Code, referred to in these two informations, and that he did not register with the Director of Internal Revenue as required by Section 3291, Title 26 of the United States Code, referred to in these two informations."

And that is signed Salvatore Apuzzo, Mr. Roseman, attorney for the defendant, and Mr. George S. Leisure, Jr., Assistant United States Attorney.

I think that is all, gentlemen.

* * * *